INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
1. The transactions	3
2. The Idaho Motor Fuels Tax Act	4
3. The State court decisions	5
Argument:	
Introduction and summary	7
I. The Idaho Motor Fuels Tax levied upon an Idaho dealer with respect to an out-of-State transaction wholly dissociated from any activities in Idaho violates both the Due Process Clause and the Commerce Clause	12
A. The Due Process Clause forbids the State to tax activities occurring outside its own borders	12
1. Every act performed by the dealer in connection with the transaction took place outside of Idaho	12
2. The fact that the vendor holds a dealer's license in the taxing State does not justify a tax upon an out-of-State transaction wholly dissociated from the vendor's local activities	15
B. A State excise tax on the vendor of motor fuels, based upon an out-of-State transaction wholly unrelated to any local activity, is an undue burden upon interstate commerce	22

Argument—Continued
II. If the Idaho tax is viewed as a levy upon the purchaser's use of the motor fuels within the State, it is invalid as a direct tax upon the United States ---- Page 24
A. A State may not tax the United States upon the use of its own property ---- 24
B. Characterizing the tax as an "assessment" for the use of the State's highways does not exempt it from the constitutional prohibition ---- 27
Conclusion ---- 35
Appendix ---- 36

CITATIONS

Cases:
Aero Transit Co. v. *Board of R.R. Commissioners*, 332 U.S. 495 ---- 28, 31
Alabama v. *King & Boozer*, 314 U.S. 1 ---- 7, 9, 26, 28
Anthony v. *Kozer*, 11 F. 2d 641 ---- 29
Atl. & Pac. Tea Co. v. *Grosjean*, 301 U.S. 412 ---- 13
Bingaman v. *Golden Eagle Lines*, 297 U.S. 626 ---- 28
City of Detroit v. *Murray Corp.*, 355 U.S. 489 ---- 25, 26
Clinton v. *State Tax Commission*, 146 Kan. 407, 71 P. 2d 857 ---- 30
Connecticut General Co. v. *Johnson*, 303 U.S. 77 ---- 13
Esso Standard Oil Co. v. *Evans*, 345 U.S. 495 ---- 23, 25, 26
Geery v. *Minnesota Tax Commission*, 202 Minn. 366, 278 N.W. 594 ---- 30
General Motors Corp. v. *Washington*, 377 U.S. 436 ---- 11, 14, 17, 18, 19, 23
General Trading Co. v. *Tax Commission*, 322 U.S. 335 ---- 7, 22, 25
Henneford v. *Silas Mason Co.*, 300 U.S. 577 ---- 16, 23, 24
International Harvester Co. v. *Department of Treasury*, 322 U.S. 340 ---- 22
Kern-Limerick Inc., v. *Scurlock*, 347 U.S. 110 ---- 7, 26
James v. *Dravo Contracting Co.*, 302 U.S. 134 ---- 30
McCulloch v. *Maryland*, 4 Wheat. 316 ---- 12, 26
McGoldrick v. *Berwind-White Co.*, 309 U.S. 33 ---- 16
McGoldrick v. *Felt & Tarrant Co.*, 309 U.S. 70 ---- 16

Cases—Continued Page

McLeod v. *Dilworth Co.*, 322 U.S. 327 .... 7, 8, 13, 14, 15, 16, 22

Northwestern Cement Co. v. *Minnesota*, 358 U.S. 450 .... 22, 23

Norton Co. v. *Dept. of Revenue*, 340 U.S. 534 .... 8, 11, 16, 17, 18, 19, 20, 21, 23, 26

Scripto V. Carson, 362 U.S. 207 .... 14, 21, 25

Spector Motor Service v. *O'Connor*, 340 U.S. 602 22

State v. *Boise City*, 57 Idaho 507, 66 P. 2d 1016 10

Taber v. *Indian Territory Co.*, 300 U.S. 1 30

Tirrell v. *Johnston*, 86 N.H. 530, 171 Atl. 641, affirmed, 293 U.S. 533 30

Union Pacific R.R. Co. v. *Riggs*, 66 Idaho 677, 166 P. 2d 926 10

Union Transit Co. v. *Kentucky*, 199 U.S. 194 13

United States v. *Allegheny County*, 322 U.S. 174 .... 26, 30

United States v. *Boyd*, 378 U.S. 39 25

United States v. *City of Detroit*, 355 U.S. 466 .... 9, 26, 28

United States v. *Livingston*, 179 F. Supp. 9, affirmed *per curiam*, 364 U.S. 281 30

United States v. *Township of Muskegon*, 355 U.S. 484 .... 25, 26

Van Brocklin v. *Tennessee*, 117 U.S. 151 26

Western Union Tel. Co. v. *Kansas*, 216 U.S. 1 .... 22, 24

Wisconsin v. *J. C. Penney Co.*, 311 U.S. 435 16

Statutes:

23 U.S.C. 101 34

23 U.S.C. 103 33

Idaho Motor Fuels Tax Act, as amended (9 Idaho Code (1963 Cum. Pocket Supp.), Secs. 49-120), *et seq.*:

Sec. 49-1201 .... 4, 5, 8, 10, 14, 15, 29, 36

Sec. 49-1202 (1957 ed.) 37

Sec. 49-1210 .... 5, 8, 15, 38

Sec. 49-1212 10

Sec. 49-1218 .... 10, 38

Miscellaneous:

24 Comp. Gen. 919 9

U.S. Dept. of Commerce, Bureau of Public Roads: Circular Memorandum, Nov. 6, 1963 33

Highway Statistics:

Tables E-7 and E-8 33

Tables SF-1, SF-4, and SF-6 33

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 19

THE AMERICAN OIL COMPANY, APPELLANT

v.

P. G. NEILL, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF FOR THE APPELLANT AND THE UNITED STATES OF AMERICA AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of the State of Idaho (R. 249–268) is reported at 383 P. 2d 350. The memorandum opinion of the District Court of the Third Judicial District of Idaho (R. 218–226) is not reported.

JURISDICTION

Appellant brought this action for refund of taxes paid under protest on motor fuel sold to the Atomic Energy Commission. Appellant alleged that the Idaho Motor Fuels Tax Act, as amended (9 Idaho Code, Secs. 49–1201 *et seq.*), under which the taxes were imposed, is repugnant to the United States Constitution. The Supreme Court of the State of Idaho upheld the statute.

The judgment below was entered on July 11, 1963. Notice of appeal was filed in the State Supreme Court on October 4, 1963. (R. 270.) This Court noted probable jurisdiction on June 8, 1964. (R. 272; 377 U.S. 962.) The jurisdiction of this Court rests on 28 U.S.C. 1257 and 2101.

This brief and any subsequent briefs will be filed jointly by the appellant and the United States as *amicus curiae*.[1] Appellant's time for oral argument will be used by the United States, with consent of counsel for appellant.

QUESTION PRESENTED

Whether, where a licensed Idaho dealer in motor fuels sells and transfers gasoline outside the State for importation into the State by the United States, the State of Idaho may consitutionally impose an excise tax upon the transaction on the theory that the dealer constructively "receives" the gasoline in Idaho upon its importation by the United States.

STATUTE INVOLVED

The relevant portions of the Idaho Motor Fuels Tax Act, as amended (9 Idaho Code, Secs. 49-1201, *et seq.*), are set forth in the Appendix, *infra*, pp. 36-39.

STATEMENT

Utah Oil Refining Company[2] brought this action for refund of $86,181.30 representing payments to the

---

[1] Appellant's contract for the supply of gasoline for the Atomic Energy Commission provides that the price is to be increased for any State taxes imposed. (R. 179.)

[2] American Oil Company, as successor to Utah Oil Refining Company, was substituted as party plaintiff. (R. 213.)

State Tax Collector of Idaho under the Idaho Motor Fuels Tax Act. The payments were made under protest on the ground that the application of the Tax Act to an out-of-state sale and delivery of gasoline to the Atomic Energy Commission would violate (1) the Due Process Clause of the Fourteenth Amendment, (2) the Commerce Clause and (3) the Supremacy Clause. (R. 4, 5, 221.)

1. THE TRANSACTIONS

The General Services Administration issued an invitation for bids for the supplying of gasoline for government activities in Idaho, Montana, Oregon and Washington, for the period from November 1, 1959, through October 31, 1960. The invitation included as items 63 and 64 the supplying of 200,000 and 1,000,000 gallons of gasoline, respectively, for the Atomic Energy Commission at Idaho Falls, Idaho. Appellant transmitted formal bids from its principal offices at Salt Lake City, Utah, to the GSA office at Seattle, and its bids on items 63 and 64 were accepted in Seattle. Each bid was submitted in alternative form, quoting a price f.o.b. Salt Lake City and a price f.o.b. the AEC activity site in Idaho, and the contract awarded was for delivery f.o.b. Utah's bulk plant at Salt Lake City (R. 220, 252). The contract price did not include State taxes but was to be increased by the amount of any such taxes imposed (R. 179).

Under the contract, the AEC through its operating agent, periodically placed orders for 1,436,355 gallons, to be delivered at appellant's bulk plant at Salt Lake City. Title to the gasoline passed to the AEC upon

delivery there. Common carriers selected and paid by the AEC transported the gasoline from Utah to government-owned storage tanks in Idaho. Monthly thereafter appellant submitted the reports required by the Idaho Motor Fuels Act and paid under protest to the State Tax Collector the six cents per gallon motor fuels tax.

Utah Oil Refining Company, a Delaware corporation authorized to do business in Idaho, was a licensed dealer as defined by the Motor Fuels Act. The AEC was not, during the period in question, and never has been, the holder of an uncanceled Idaho dealer permit (R. 253).

The gasoline was consumed in motor vehicles owned by the federal government, and used in Idaho for transporting personnel connected with the AEC. Phillips Petroleum Company, under contract with the AEC, operated buses between Idaho Falls and the National Reactor Testing Station. A fee was charged for the transportation of persons using the government buses, which fee was credited to the government. Losses involved in operating the buses were fully absorbed by the government. (R. 252.)

2. THE IDAHO MOTOR FUELS TAX ACT

The Idaho Motor Fuels Tax Act imposes an excise tax of six cents per gallon on motor fuels. The tax is to be paid by the "dealer," who is defined by the Act as any person who first "receives" motor fuels in Idaho within the meaning of the term "received" as defined in the Act (9 Idaho Code, Secs. 49-1201, 49-

1210). The definition of "received" (9 Idaho Code, Sec. 49-1201, as amended in 1959, S.L. 1959, Ch. 75), provides, *inter alia*—

> that motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the State of Idaho.

The dealer is not required to pass on the tax or collect it from the person to whom he sells the fuel or from the ultimate consumer (R. 223).

Pursuant to this provision, the Idaho Tax Collector demanded that appellant, an out-of-State corporation holding a license as a "dealer" under the Idaho Tax Act, pay the motor fuels tax on its sales of gasoline in Utah to the AEC. The Company paid the taxes under protest and instituted this action for refund in the District Court of the Third Judicial District of the State of Idaho.

3. THE STATE COURT DECISIONS

On the basis of affidavits and exhibits filed by both parties, the district court granted summary judgment for appellant, holding that the tax is not a use tax, but rather "is basically upon a licensed dealer's privilege of first owning motor fuel in the State of

Idaho for the purpose of sale, delivery, or consumption of the same in the state"; that the taxable event is the "receipt" of the gasoline by the dealer; that under the facts of this case the tax is one on a privilege which was exercised and performed wholly outside the State of Idaho; and that, as such, its imposition is a violation of the Commerce Clause and Due Process Clause (R. 222–226).

The State Supreme Court reversed and upheld the validity of the tax. It found that title did in fact pass from appellant to the AEC at the bulk plant in Salt Lake City. The Court stated, however (R. 255):

> The passage of title to the fuels is not the criterion upon which the tax operates; the incident which establishes the liability for payment of the tax by the licensed dealer is its "receiving" the fuels. The statute creates a continuing obligation on the dealer as to fuels sold, supplied, or furnished outside of this state for importation herein. This obligation of the first licensed dealer is only discharged upon its transacting of business with another licensed dealer, or by payment of the tax.

The Court held that the requirements of the Commerce and Due Process Clauses were satisfied by (1) the fact that the appellant had subjected itself to the jurisdiction and control of the State of Idaho when it became authorized to do business there, and additionally when it became an Idaho "dealer,"; and (2) the fact that the gasoline was intended for use in Idaho (R. 265).

ARGUMENT

INTRODUCTION AND SUMMARY

The question of the constitutionality of a State excise tax typically arises in two classes of cases: those involving the sale of goods outside the taxing State for use within that State, and those involving the sale of goods to the federal government or one of its instrumentalities. In both types of situation, the governing principles are well settled. In the first situation, a tax upon the out-of-State sale itself, or upon some privilege exercised by the out-of-State vendor in connection with the sale, is banned both by the Commerce Clause and the Due Process Clause of the Fourteenth Amendment, albeit a tax may validly be laid upon the purchaser's in-State use and even made collectible by the vendor. Compare *McLeod* v. *Dilworth Co.,* 322 U.S. 327, with *General Trading Co.* v. *Tax Commission,* 322 U.S. 335. In the second situation, a tax upon the purchaser would run afoul of the government's constitutional immunity from State taxation, although, if the sale is an in-State transaction, a tax upon the dealer would be permissible. Compare *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, with *Alabama* v. *King & Boozer,* 314 U.S. 1.

The present case combines elements of both these fundamental situations. Here the appellant—a distributor of motor fuels which held an Idaho dealer's permit but did most of its business elsewhere—sold and delivered gasoline to the Atomic Energy Commission in Utah for use by the Commission at its large Idaho installation. Every act performed by

the appellant in the course of soliciting, consummating, and performing the contract took place outside of Idaho; the transaction was wholly unrelated to appellant's Idaho operations and owed nothing to any protection or benefit afforded by that State. In these circumstances, the Idaho Motor Fuels Tax is caught in an inescapable dilemma. If the legal incidence of the tax falls upon a privilege exercised by the dealer (*e.g.,* receiving, owning, or selling the gasoline), it plainly constitutes an extraterritorial exaction forbidden by the Due Process Clause. On this assumption, it also violates the Commerce Clause by taxing the dealer's privilege of engaging in interstate commerce. *McLeod* v. *Dilworth Co., supra; Norton Co.* v. *Dept. of Revenue,* 340 U.S. 534. On the other hand, if the statute is viewed as a tax upon the purchaser's use of the gasoline within Idaho (or, as is now contended, its use of the State's highway), it is invalid as a direct tax upon the United States.

In this unusual case, therefore, the characterization of the tax is not decisive of its validity, but merely identifies the particular constitutional reef upon which the tax founders. It is nonetheless important, for purposes of analysis, to ascertain the legal incidence of the tax and, more particularly, to determine whether it falls upon the dealer or upon the purchaser or user.

The Idaho Motor Fuels Tax is described by statute as "an excise tax," payable by licensed "dealers," upon motor fuels "received" by them, as that term is defined in the statute (9 Idaho Code, 49-1210, 49-1201). Unlike the customary "use" tax, which is

imposed on the user and merely "collected" by the vendor, the Idaho statute contains no provision requiring the vendor to pass on or collect the tax from his customers, and no provision making the customers ultimately responsible for payment of the tax. While the dealer may choose to shift the economic burden of the tax to the purchaser, he does not thereby shift its legal incidence. Cf. *Alabama* v. *King & Boozer,* 314 U.S. 1; *United States* v. *City of Detroit,* 355 U.S. 466. On its face, therefore, the Act seems clearly to impose a tax upon the dealer, not the purchaser.

This view of the Act was adopted by the Attorney General of Idaho in a formal ruling (opinion dated May 9, 1950, addressed to Counsel, United States Atomic Energy Commission, quoted at pp. 23–24 of American Oil Company's brief before the Supreme Court of Idaho), which stated as follows:

> The Motor Fuels Tax Act does not lay a tax on any purchaser or vendee. On the contrary, it taxes the dealer or vendor. The dealer is not required to collect the tax from the purchaser * * *.

The Comptroller General of the United States reached the same conclusion in decisions dated June 22, 1945 (24 Comp. Gen. 919), and November 5, 1951 (R. 19–27), and on the basis of that conclusion authorized payment of the Idaho Motor Fuels Tax, as passed on by dealers to contractors of the Department of Agriculture, with respect to sales occurring within the State of Idaho.

In accordance with the plain language of the Act, and with its interpretation by the State Attorney General, the trial court here regarded the levy as a

privilege tax on the dealer rather than a use tax on the consumer (R. 222–223, 226). The tax, it declared, "is basically upon a licensed dealer's privilege of first owning motor fuel in the state of Idaho for the purpose of sale, delivery, or consumption of the same in the State, except in a factual situation such as is here involved" (R. 222–223).[3]

The Supreme Court of Idaho apparently concurred in this view, declaring that the Act places "the immediate burden of the tax on those who are first in a position to control the distribution of the motor fuels throughout the state—on the 'dealers' as that term is defined by the statute" (R. 265). There are also other indications in the opinion that the court believed the legal incidence of the tax to be upon the dealer (see *infra*, pp. 28–29). On the other hand, the court also stated, as it had in earlier cases, that the *purpose* of the tax was "to exact a proportionate amount from the users of the highways of this state for a specific purpose,—that of building and maintaining public highways within the state"[4] (R. 265).

[3] In all cases except the one at issue here, liability for payment is laid upon a "dealer" or "person" who is the owner of the fuel at some point in time when the fuel is physically located in Idaho. 9 Idaho Code, 49–1201.

[4] See, also, *Union Pacific R.R. Co.* v. *Riggs*, 66 Idaho 677, 166 P. 2d 926; *State* v. *Boise City*, 57 Idaho 507, 66 P. 2d 1016. Consistent with that purpose, the Act directs that the monies collected through the tax are to be paid into and credited to the state highway fund (9 Idaho Code, 49–1212). It also authorizes refunds to those purchasers to whom the dealer has passed on the tax and who can show that the gasoline they bought was not used in motor vehicles operated or intended to be operated on Idaho's highways (9 Idaho Code, 49–1218 (a) and (b)).

While the court's decision is therefore not free from ambiguity, its interpretation of the statute would seem to coincide with that of the trial court, which stated (R. 223):

> While it may be the overall policy of the state to collect a tax of 6¢ per gallon on all gasoline used to propel motor vehicles over Idaho state highways, the taxable event or transaction is not the use by the local consumer or purchaser, but the "receipt" of the gas by the dealer. * * *

While in our view the legal incidence of the Idaho tax is clearly upon the dealer, rather than upon the consumer, we shall discuss the constitutional issues on both assumptions. In Point I, we adopt the premise that the levy is a privilege tax on the dealer. We demonstrate that the tax, so viewed, violates the basic jurisdictional principle, embodied in the Due Process Clause, that a State has no power to tax transactions and activities which take place outside its own borders and with which it has no nexus. We further show that neither appellant's status as a licensed dealer in Idaho, nor the fact that it does business in that State, justifies the imposition of a tax upon an out-of-state transaction, such as this, which is wholly dissociated from appellant's local activity. *Norton Co.* v. *Dept. of Revenue,* 340 U.S. 534. See, also, *General Motors Corp.* v. *Washington,* 377 U.S. 436. Similar considerations, we argue, condemn the tax under the Commerce Clause.

In Point II, we adopt the alternative—and, we believe, incorrect—assumption that the incidence of the

tax is upon the purchaser and its use of the gasoline in Idaho. On that hypothesis, the statute, as here applied, taxes an agency of the federal government upon the use of its own property. Such a tax clearly contravenes the long-settled principle that the United States, its property, functions, and activities are not subject to state taxation. *McCulloch* v. *Maryland,* 4 Wheat. 316. We deal next with the novel contention—advanced for the first time in this Court—that the Idaho tax is in essence a "toll or assessment" exacted from consumers in payment for the use of the State's highways, and that the government's constitutional immunity does not shield it from a "compensatory" exaction such as this is alleged to be. In reply, we show that there is no sound basis for the appellees' characterization of the tax, and that even if there were, the principle of federal governmental immunity from State taxation would apply to this, as to any other, tax.

I. THE IDAHO MOTOR FUELS TAX LEVIED UPON AN IDAHO DEALER WITH RESPECT TO AN OUT-OF-STATE TRANSACTION WHOLLY DISSOCIATED FROM ANY ACTIVITIES IN IDAHO VIOLATES BOTH THE DUE PROCESS CLAUSE AND THE COMMERCE CLAUSE

A. THE DUE PROCESS CLAUSE FORBIDS THE STATE TO TAX ACTIVITIES OCCURRING OUTSIDE ITS OWN BORDERS

1. *Every act performed by the dealer in connection with the transaction took place outside of Idaho*

It is well settled that the Due Process Clause of the Fourteenth Amendment forbids a State to tax activities or transactions which occur outside its borders. *Union Transit Co.* v. *Kentucky,* 199 U.S. 194; *Con-*

necticut General Co. v. *Johnson,* 303 U.S. 77.[5] The appellant's transfer of gasoline to the Atomic Energy Commission was unquestionably an out-of-state transaction *vis-a-vis* Idaho. Each and every phase of the transaction in which the appellant participated had its locus outside of Idaho: invitations for bids were issued by the government in Seattle, Washington; appellant submitted its bids from Salt Lake City; the bids were accepted in Seattle; the contract called for delivery of the gasoline f.o.b. Salt Lake City; appellant delivered the gasoline to carriers selected by the government at appellant's bulk plant in Salt Lake City, and it was there that title passed. Not a single act performed by appellant in the course of soliciting, consummating, and performing the contract of sale took place in Idaho or was in any manner dependent upon the grace of that State. The Due Process clause therefore bars the imposition of any tax upon the appellant with respect to this transaction.[6]

It is immaterial, in these circumstances, which aspect of the transaction is treated as the "taxable event." A tax upon the sale itself—the transfer of title or possession—would undeniably be invalid under *McLeod* v. *Dilworth Co.,* 322 U.S. 327.[7] The Idaho

[5] Nor may a State tax the exercise in another State of any right or privilege derived from the laws of that State. *Atl. & Pac. Tea Co.* v. *Grosjean,* 301 U.S. 412, 424.

[6] The transaction could, of course, be taxed by the State of Utah. However, there is no Utah tax applicable to the sale.

[7] That decision appears to have been grounded on the Commerce Clause rather than upon the Due Process Clause. As

tax stands on no better footing merely because its nominal subject is the "receiving" of fuels by the dealer—or, as the trial court put it, the "licensed dealer's privilege of first owning motor fuel * * * for the purpose of sale, delivery, or consumption of the same" in Idaho (R. 222–23). Here the "receiving" presumably took place in Salt Lake City and had even less to do with Idaho than did the subsequent sale.

Idaho seeks to avoid this constitutional barrier by resort to a bald fiction. The statute provides that (49–1201(g)):

> * * * motor fuel which is in any manner supplied, sold or furnished * * * by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho. * * *

Obviously the constitutional reach of a State's taxing power is not determined by such make-believe. Indeed, the language quoted above merely shows how

---

Mr. Justice Rutledge pointed out in his concurring opinion (322 U.S. 349, 353), the two provisions "are not always sharply separable in dealing with these problems" and are overlapping in content. The Court has often referred to them interchangeably or accumulatively in discussing that the power of a State to tax transactions which both arise in interstate commerce and are alleged to lack sufficient contacts with the taxing State. See, *e.g.*, *Scripto* v. *Carson*, 362 U.S. 207, 208; *General Motors Corp.* v. *Washington*, 377 U.S. 436, 437.

little the Idaho motor fuel tax, as here applied, differs from the sales tax struck down in *McLeod* v. *Dilworth Co., supra.* For when Section 49-1210 is read together with Section 49-1201(g), it becomes apparent that this exaction is nothing more than "an excise tax * * * on all motor fuels * * * supplied, sold, or furnished * * * by an Idaho licensed dealer, for importation into the state of Idaho * * *." In reality, therefore, the event which makes the tax operative here is not the appellant's "receiving" of motor fuels in Idaho—for that never happens—but rather its act of selling or supplying motor fuels in Utah for importation into Idaho. And that event lies beyond Idaho's power to tax.

2. *The fact that the vendor holds a dealer's license in the taxing State does not justify a tax upon an out-of-State transaction wholly dissociated from the vendor's local activities*

The court below found two "local incidents" sufficient to bring this transaction within Idaho's taxing power (R. 265):

(1) that the appellant had sold the gasoline with knowledge that it would be imported into, and used within, Idaho by the Atomic Energy Commission;

(2) that the appellant had been authorized to do business in Idaho and had applied for and received a dealer's license permitting it to "enter into the Idaho market as a distributor of motor fuels."

In our view, neither of these factors affords any basis for sustaining Idaho's contention that this out-of-State transaction is subject to its taxing powers. The first proposed nexus merits little discussion. More

than once this Court has struck down a sales or gross receipts tax upon transactions which it held to be insufficiently related to activities within the taxing State, despite the fact that the vendor well knew that the goods were destined for use in that State and indeed shipped them there himself. See *McLeod* v. *Dilworth Co., supra; Norton Co.* v. *Dept. of Revenue,* 340 U.S. 534. And in those cases in which the Court has upheld taxes upon in-shipments from a point outside the taxing State, it has done so exclusively on the ground that the direct burden of the levy was laid on some incident, activity or use within the State. Cf. *Henneford* v. *Silas Mason Co.,* 300 U.S. 577; *McGoldrick* v. *Berwind-White Co.,* 309 U.S. 33, and *McGoldrick* v. *Felt & Tarrant Co.,* 309 U.S. 70.

It is equally plain that neither appellant's status as a licensed dealer in Idaho nor the fact that it engaged in business there will suffice to sustain the tax on this particular transaction. Appellant plainly did not need Idaho's permission in order to make this sale. It exercised no privilege which Idaho had power to grant or withhold, and availed itself of no opportunity or benefit for which Idaho reasonably can seek return. See *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 444.

Thus, the court below was entirely inaccurate in stating that the Idaho dealer's permit authorized appellant "to engage in the very activity it now claims to be exempt from the tax" (R. 265). With respect to the present transaction, the fact that appellant happened to hold an Idaho dealer's permit was

purely fortuitous. There were other Utah distributors which did not; and had the United States chosen to purchase gasoline from one of those concerns, Idaho would have had no statutory, let alone constitutional, basis for imposing a tax, albeit its relationship to the transaction would have been no more tenuous than it is here.

Two decisions of this Court make clear that a company authorized to do, and doing, business in the taxing State cannot be taxed on interstate transactions which are wholly unrelated to its in-State activities. *Norton Co.* v. *Dept. of Revenue,* 340 U.S. 534; *General Motors Corp.* v. *Washington,* 377 U.S. 436. In the *Norton* case, a Massachusetts corporation maintained a branch office and warehouse in Chicago, from which it made local over-the-counter sales at retail. In addition, it made sales to Illinois customers from its Worcester headquarters—some based on orders or filled by shipments routed through the Chicago outlet; other based on orders sent directly to Worcester and filled by direct shipments of goods from Worcester to the Illinois customer. Illinois sought to impose its retail tax on the gross receipts derived by Norton from all its sales to Illinois residents, whether or not connected with the Chicago outlet. This Court stated (at 537) that when a corporation has gone into a State to do local business by State permission, it can avoid taxation on some of its sales "only by showing that particular transactions are dissociated from the local business and interstate in nature." On that basis, the Court

concluded that Illinois could reasonably apply its tax to those sales which utilized the Chicago branch either in receiving the orders or distributing the goods, since Norton "had not established that such services as were rendered by the Chicago office were not decisive factors in establishing and holding this market" (*id.* at 538). It further held, however, that those "orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester" were "so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business" (*id.* at 539).

The *General Motors* case involved essentially the same issue. General Motors sold vehicles, parts, and accessories at wholesale to independent dealers in Washington. Some sales were made through a warehouse operated by General Motor Parts Division in Seattle or through a one-man branch office in Seattle, maintained by Chevrolet; most of the sales, however, resulted from orders which were sent by Washington dealers directly to the corporation's zone office at Portland and were filled by direct shipments to the dealers from the factory. Washington levied a tax upon the unapportioned gross receipts derived by General Motors from all of its deliveries in the State. In sustaining the tax, this Court stated, as it had in *Norton,* that the burden is on the taxpayer to show that the transactions claimed to be exempt are "dissociated from the local business and interstate in character"; the test, it said, is "whether the State has exerted its power in proper proportion to appellant's

activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded" (377 U.S. at 441).

Applying that criterion, the Court stressed that the company had "district managers, service representatives and other employees who were residents of the State and who performed substantial services in relation to General Motors' functions therein, particularly with relation to the establishment and maintenance of sales, upon which the tax was measured" (p. 447). The district managers supervised and helped to train and organize the dealers' sales forces; the service representatives performed somewhat similar functions for the dealers' service departments. All of these activities were directed toward retaining and enlarging General Motors' market in Washington, and thus played a role in promoting the very sales, including those in Portland, which Washington sought to tax. The Court concluded, therefore, echoing its language in *Norton,* that General Motors had failed to establish that the in-State activities "were not decisive factors in establishing and holding this market" (*id.* at 448).

When these standards are applied to the present case, it is plain that the bulk sale of gasoline to the Atomic Energy Commission was wholly "dissociated" from appellant's activities in Idaho and owed nothing whatever to "the opportunities and protections which [that] State has afforded." The sale grew out of an invitation for bids to supply gasoline to certain government agencies in four States, issued by the General Services Administration at its Seattle office; the an-

swering bid was transmitted from appellant's principal offices in Salt Lake City to Seattle and there accepted. There is no reason to suppose that appellant's dealership activities in Idaho contributed in any way to the procurement or performance of this contract. Indeed, the connection between appellant's presence in Idaho and the out-of-state sale here in issue was far more remote than the corresponding relationship in *Norton*. Both the majority and the dissenters in *Norton* noted (340 U.S. at 538, 541) that the Chicago outlet was the company's only source of "customer relationship" in the Illinois market; afforded the only means by which the company could be reached with process in local courts by aggrieved Illinois customers; and provided service to, or replacement of, defective machines, whether or not purchased through the Chicago warehouse itself. Here, none of those links is present. The government's bulk purchase, achieved through a formal bidding procedure carried on wholly outside of Idaho, in no way depended upon "customer relationship" with appellant's outlets or personnel in Idaho. Moreover, having purchased fuel, rather than machinery (as in *Norton*), the government will have no occasion to call upon appellant for servicing or replacement. And appellant's amenability to service of process in Idaho is scarcely significant; should the government ever find it necessary to bring legal action against appellant, it would have a wide choice of forums (including Utah), and (unlike Norton's retail customers in Illinois) might well deem it less convenient to sue in

Idaho than elsewhere. In short, if the functions performed by the Chicago outlet in *Norton* were insufficient to justify a tax on the Worcester transactions, *a fortiori* appellant's dealership in Idaho will not support the extra-territorial levy here sought to be imposed.

Scripto v. *Carson,* 362 U.S. 207, upon which the court below primarily relied (R. 264–265) is not inconsistent with these conclusions. There, a Georgia corporation having no place of business or regular employees in Florida, continuously solicited sales in that State through independent brokers or jobbers. Orders were forwarded by these solicitors to Georgia for acceptance there and were filled by shipments of goods directly to the Florida customers. In view of this continuous local solicitation, the Court held that Florida could constitutionally require the Georgia vendor to collect from its Florida customers the tax imposed by Florida upon their use of those products within the State.

That holding is plainly inapplicable to the present case. In *Scripto,* the company's solicitation activities in Florida generated the very transactions to which the tax pertained; here, on the other hand, the transaction sought to be taxed was not the product of solicitation or any other activities in Idaho. Furthermore, the question presented in *Scripto* was not, as here, whether Florida could levy a tax on the Georgia vendor, but whether it could require the vendor to collect for the State a concededly valid use tax levied upon the Florida purchaser. The decisions of this

Court make clear that the kind of nexus which justifies the collection requirement will not necessarily warrant the imposition of a tax whose incidence is upon the out-of-state vendor. Compare *McLeod* v. *Dilworth Co.*, 322 U.S. 327 with *General Trading Co.* v. *Tax Commission*, 322 U.S. 335.

B. A STATE EXCISE TAX ON THE VENDOR OF MOTOR FUELS, BASED UPON AN OUT-OF-STATE TRANSACTION WHOLLY UNRELATED TO ANY LOCAL ACTIVITY, IS AN UNDUE BURDEN UPON INTERSTATE COMMERCE

While the transaction was, as we have shown, an "out-of-State" transaction with respect to Idaho, it was followed, as the parties contemplated that it would be, by a movement of goods across State lines into Idaho. The transaction might well be viewed, therefore, as one "in interstate commerce." If it be so regarded, the same considerations which render the Idaho motor fuels tax invalid under the Due Process Clause also condemn it under the Commerce Clause as an undue burden upon interstate commerce.[8] It is beyond dispute that a State may not lay a tax on the privilege of engaging in interstate commerce, *Spector Motor Service* v. *O'Connor*, 340 U.S. 602; *Northwestern Cement Co.* v. *Minnesota*, 358 U.S. 450, 458. On the other hand, a State is free to levy upon activities

[8] In his separate opinion (322 U.S. 349) concurring in *General Trading Co.* v. *Tax Commission*, *supra*, and *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, and dissenting in *McLeod* v. *Dilworth Co.*, *supra*, Mr. Justice Rutledge stated ~~(at 353)~~: "'Due process' and 'Commerce clause' conceptions are not always sharply separable in dealing with these problems." Cf., *e.g.*, *Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1. To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the States becomes undue.

conducted within its borders, even when those activities give rise to, or are integrally connected with, interstate commerce. See, *e.g., Henneford* v. *Silas Mason Co.,* 300 U.S. 577; *Esso Standard Oil Co.* v. *Evans,* 345 U.S. 495; *Northwestern Cement Co.* v. *Minnesota, supra; General Motors Corp.* v. *Washington,* 376 U.S. 436. In the present case, however, there simply is no in-state "handle" for Idaho to grasp. As we have seen, every aspect of this transaction in which the appellant participated took place outside of Idaho. In these circumstances, the Idaho statute, as here applied, can only be regarded as a tax upon the privilege of engaging in interstate commerce or as a direct tax upon the interstate movement of goods itself. Indeed, the statute itself describes the taxable event—the receipt of motor fuel by an Idaho licensed dealer—as the sale by such dealer "for importation into the state of Idaho from a point of origin outside the state * * *" (p. 5, *supra*).

This conclusion is not altered by the fact that the appellant held a dealer's license in Idaho and was authorized to do business there. We recognize that a State may tax the privilege of doing business and may include in the measure of that tax the income (or gross receipts) derived from all transactions, including interstate transactions, growing out of activities within its borders. *General Motors Corp.* v. *Washington, supra; Northwestern Cement Co.* v. *Minnesota, supra.* At the same time, however, the State must rigorously exclude from the computation of the tax those interstate operations which, as in the case here, are unrelated to any of the taxpayer's local activities. *Norton Co.* v. *Dept. of Revenue,* 340 U.S.

534. A contrary rule would discriminate against interstate commerce; for it would enable the State to exact a higher price for its permission to do business from a company with interstate operations than from a purely intrastate company, although the local activities of each yielded an identical amount of income (or gross receipts). Virtually the same evil was condemned by this Court in *Western Union Tel. Co.* v. *Kansas,* 216 U.S. 1, in which a State franchise tax measured in part by the value of the taxpayer's property outside the State was held to be a direct burden on the company's interstate operations.

II. IF THE IDAHO TAX IS VIEWED AS A LEVY UPON THE PURCHASER'S USE OF THE MOTOR FUELS WITHIN THE STATE, IT IS INVALID AS A DIRECT TAX UPON THE UNITED STATES

A. A STATE MAY NOT TAX THE UNITED STATES UPON THE USE OF ITS OWN PROPERTY

We have assumed thus far—correctly, we believe—that the legal incidence of the Idaho tax is upon the dealer. If, on the other hand, the tax be viewed as a levy upon the purchaser's privilege of using motor fuel within the State of Idaho, the statute founders upon another constitutional reef. To be sure, neither the Due Process Clause nor the Commerce Clause precludes a State from taxing the purchaser's use, within the State's borders, of goods which have come to rest after completion of an interstate shipment. *Henneford* v. *Silas Mason Co.,* 300 U.S. 577. And where the taxing State has a sufficient nexus with the sales transactions—*e.g.,* where the seller is operating a

sales organization within the State—it can require the out-of-state vendor to collect the taxes for it. *Scripto* v. *Carson*, 362 U.S. 207; *e.g., General Trading Co.* v. *Tax Commission*, 322 U.S. 335. In the present case, however, the purchaser of the goods was not a private party, but an agency of the federal government. Title to the gasoline passed to the United States prior to shipment into Idaho, and the fuel was consumed within the State in vehicles owned by the United States.[9] No proposition is better established

[9] Appellees originally took the position that Phillips Petroleum Company (which operated the buses in which the fuel was used), and not the United States, was the actual purchaser and user of the fuels (R. 221). Their aim, however, was not to establish that the incidence of the tax was on Phillips Petroleum Company as user, but, rather, that the sale was in substance one *from* appellant *to* Phillips Petroleum Company *within* Idaho (R. 221). The Idaho Supreme Court found, as is clearly the case, that title did in fact pass from appellant to the United States in Utah (R. 255). It found further that "The status of Phillips Petroleum Company, as a licensed dealer, is immaterial to this decision" (R. 253). Hence, the fact that the United States was the owner and consumer of the gasoline would appear to be here not open to challenge.

It is true, of course, that under certain circumstances, and under a statute designed to that end, a private contractor may be taxed for the use of property owned by the United States. *United States* v. *Township of Muskegon*, 355 U.S. 484; *City of Detroit* v. *Murray Corp.*, 355 U.S. 489; *United States* v. *Boyd*, 378 U.S. 39; *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495. But it is not necessary to consider whether Idaho might constitutionally impose a motor fuel tax on Phillips Petroleum Company under the circumstances here—since, as noted above, appellees have never contended that the instant tax was imposed on Phillips Petroleum Company, and the opinion of the Idaho Supreme Court expressly disclaimed any such basis for its decision. Compare, for example, the very different type of statute involved in *Boyd*, *supra*, or *Esso Oil*, *supra*.

than that the property, functions, and activities of the United States and its instrumentalities are immune from taxation by the States. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Van Brocklin* v. *Tennessee*, 117 U.S. 151; *United States* v. *Allegheny County*, 322 U.S. 174; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110. A State tax upon the government for the use of its own property would clearly violate this settled constitutional prohibition.

Furthermore, if a State cannot constitutionally impose a use tax upon the United States, it necessarily follows that it cannot require a private vendor to collect from the government that impermissible tax. It is true, of course. "that the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed *on them* merely because part or all of the financial burden of the tax eventually falls on the Government" (emphasis added). *United States* v. *City of Detroit*, 355 U.S. 466, 469. Accord, *United States* v. *Township of Muskegon*, 355 U.S. 484; *City of Detroit* v. *Murray Corp.*, 355 U.S. 489; *Alabama* v. *King & Boozer*, 314 U.S. 1; *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495. That precept, however, presupposes that the legal incidence of the tax, as distinguished from the ultimate economic burden, is upon the private contractor, rather than the government. In each of the cases cited, this Court recognized, implicitly or explicitly, that a State cannot lay a tax upon the United States or its property; in each case it sustained the tax in question only upon concluding that

its legal onus was on some privilege exercised by the contractor. Thus, on the premise that the Idaho tax is imposed on the user—and merely "collected" from the dealer—the cases cited above do not support, and indeed further undermine, the validity of the imposition.

B. CHARACTERIZING THE TAX AS AN "ASSESSMENT" FOR THE USE OF THE STATE'S HIGHWAYS DOES NOT EXEMPT IT FROM THE CONSTITUTIONAL PROHIBITION

In their brief in the court below (p. 10), appellees maintained that the Idaho Motor Fuels Tax "clearly is nothing more than a privilege tax upon the dealers." They now have abandoned that position. In their Motion to Dismiss this appeal, they argued for the first time that what the statute describes as "an excise tax" payable by licensed "dealers" on each gallon of motor fuels "received" (or constructively "received") by them in Idaho is, in reality, a "toll or assessment" exacted from consumers as payment to the State for use of its highways. They further contend that the government's constitutional immunity from State taxation does not exempt it from a purely "compensatory" exaction such as this is alleged to be. There is no sound basis, we submit, either for the appellees' characterization of the tax or for the novel exception they seek to engraft upon the principle of inter-governmental tax immunity.

The fact that the Idaho Motor Fuels Tax Act does not require the dealer to pass on or collect the tax, and does not make the purchaser liable in any way for its payment, would seem a decisive indication that the operative incidence of this levy is upon the dealer,

rather than upon the consumer.[10] The dealer may or may not choose to shift the economic burden of the tax to his customers, but in no event can he shift its legal incidence. Cf. *Alabama* v. *King & Boozer,* 314 U.S. 1; *United States* v. *City of Detroit,* 355 U.S. 466. The Attorney General of Idaho, the Comptroller General of the United States, and the trial court in the instant case have explicity ruled this to be a privilege tax imposed upon the dealer. The decision of the Supreme Court of Idaho is less precise. But while noting that the ultimate purpose of the statute was to obtain from highway users the funds needed to build and maintain the State's roads, the court further declared that the means chosen to achieve that end was a levy "placing the immediate burden of the tax on those first in a position to control the distribution of the motor fuels throughout the state—on the 'dealers' * * *" (R. 265). Significantly, moreover, the court made no attempt to sustain the tax on the theory now

[10] The fact that the proceeds of the tax were required by statute to be paid into the State highway fund is not decisive of its legal character. In *Bingaman* v. *Golden Eagle Lines*, 297 U.S. 626, this Court held that a New Mexico excise tax on gasoline was not a charge for the use of the highways, despite the fact that the funds were devoted by statute to the building and maintenance of those highways, and therefore could not validly be exacted from a motor carrier engaged solely in interstate commerce. Conversely, in *Aero Transit Co.* v. *Board of RR Commissioners*, 332 U.S. 495, Montana taxes imposed on motor vehicles operated by common carriers were held to be consideration for the use of the State's highways, and therefore valid even as applied to an interstate carrier, albeit the proceeds of the taxes were not earmarked for highway purposes but went into the State's general fund.

advanced by the appellees. Nor did it suggest that the trial court, or the parties, had misconceived the nature of the tax in regarding it as a privilege tax upon dealers. Nearly the whole of its opinion was addressed to questions pertaining to the Due Process and Commerce Clauses—questions which would have only secondary importance (see *infra*, p. 32) if this were truly a tax or "assessment," upon the United States. In turning finally to the question of the government's constitutional immunity, the court below concluded merely "that the tax immunity of the Atomic Energy Commission, if such there be, does not extend to the contractor furnishing the supplies. See: *Esso Standard Oil Co.* v. *Evans,* 345 U.S. 495 * * *; *Alabama* v. *King & Boozer, supra* * * *" (R. 268). As we have shown, the principle thus invoked by the court, and the authorities cited in support of it, are applicable to the present case only on the assumption that the legal incidence of the Idaho exaction is upon the appellant, and not upon the government.

But even if the appellees were correct in their characterization—that is to say, even if the exaction were viewed as a tax upon the purchaser for the privilege of using the State's highways—the levy would be barred as a direct tax upon the government. We note, first, that in no event can this imposition be regarded as a "toll" in the accepted sense of that term, *i.e.,* a specific charge for a specific use of a particular bridge, tunnel, or stretch of highway, exacted upon each occasion of such use and as a prerequisite thereto. Cf. *Anthony* v. *Kozer,* 11 F. 2d 641, 645 (D.C. Ore.). The government customarily pays true

tolls, just as it would pay for gas or electricity purchased from a State or municipality. Both in form and in substance, however, the exaction imposed by the State of Idaho, in the present case is a tax, rather than a toll.

The principle that the United States, its property, its essential functions and activities are not the subject of taxation by the States "has not been questioned in modern times." *United States* v. *Livingston,* 179 F. Supp. 9, 19 (E.D.S.C.), affirmed *per curiam,* 364 U.S. 281. "[T]his Court never has departed from that basic doctrine or wavered in its application." *United States* v. *Allegheny County,* 322 U.S. 174, 176. Nor has the Court ever intimated that the applicability of the doctrine is dependent upon the particular purpose for which the State levies the tax.[11] Appellees argue that the government's im-

---

[11] Appellees' reliance (Motion, pp. 6–8, 10) on *Tirrell* v. *Johnston,* 86 N.H. 530, 171 Atl. 641, affirmed, 293 U.S. 533, is misplaced. Tirrell was a rural mail carrier who sought exemption from a State tax or toll imposed on those who purchased gasoline for highway use. His plea was rejected on two grounds: first, because a toll, as opposed to a tax, could be exacted from a federal instrumentality; and second, because, even if the exaction were considered a tax, its incidence was not directly on the United States, since the gasoline was purchased by a private individual. This Court affirmed solely on the second ground: every case cited in the *per curiam* affirmance turned on the issue whether the direct incidence of the disputed tax was on the federal government. It is only in the context of this issue that the *Tirrell* case has been subsequently cited as authority. See, *e.g.*, *Taber* v. *Indian Territory Co.*, 300 U.S. 1, 4; *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 163. *Clinton* v. *State Tax Commission*, 146 Kan. 407, 410, 71 P. 2d 857, 859; *Geery* v. *Minnesota Tax Commission*, 202 Minn. 366, 370, 278 N.W. 594, 596. Thus, *Tirrell* is distinguishable

munity ought not protect it from a tax, or "assessment," intended merely to reimburse the State for a specific class of facilities or services it has provided. In varying degrees, however, nearly all taxation involves the element of "compensation." On the theory now proposed, it could as well be argued that the government must submit to a real property tax designed to compensate the State for police and fire protection, street and sidewalk maintenance, and other benefits which are provided to—and (in the only sense relevant to such services)[12] used or enjoyed by—the government in common with other property owners. Yet such a tax would plainly be impermissible.

Appellees' reliance on *Aero Transit Co.* v. *Board of RR Commissioners,* 332 U.S. 495, and cases cited therein, is misplaced. Those cases held that a State

---

on two grounds: (1) the incidence of the tax there was on the purchaser rather than the vendor; and (2) the purchaser was not the federal government, but a private contractor. Further, that branch of the holding which may be construed as standing for the proposition that a State may exact a toll, as distinguished from a tax, from the United States, was not affirmed by this Court and has apparently not been followed as a precedent by other courts.

[12] Police and fire protection is not "used" by property owners merely on those rare occasions when a burglar breaks in or a fire breaks out. The deterrence of crime, surely the most important function of a police force, is a benefit continuously enjoyed by every property owner, including the government. The government also derives the same benefit as any urban or suburban property owner from the constant availability of the municipal fire department, and on the appellees' theory should pay a pro rata share of the costs of maintaining that department.

has the right, consistently with the Commerce Clause, to impose a non-discriminatory tax as compensation for use of its highways, even upon owners and operators of motor vehicles engaged exclusively in interstate commerce. That rule is merely a specific application of the more general principle that, while a State may not tax the privilege of engaging in interstate commerce as such, it may require a company so engaged to pay a tax upon its in-State activities in return for the benefits made available to it by the State. In other words, interstate commerce may be required to "pay its own way." But if the doctrine of intergovernmental tax immunity means anything, it means that the United States may *not* be compelled to "pay its own way"—may not, that is, be subjected to taxation, however non-discriminatory, upon its activities and operations within the State.

In the final analysis, the appellees' argument comes down to the contention that it would simply be unfair to relieve the government of its proportionate share of the costs of building and maintaining the State's highways, thereby loading a disproportionate share of these costs upon private users. We do not believe that the application of the principles relating to tax immunity can be made to depend on a balancing of equities. But even if equitable considerations were thought to bear upon the proper resolution of this issue, we would dispute any suggestion that the equities here favor the application of the tax.

A very substantial proportion of the funds used to construct Idaho's highways is supplied by the Federal

Highway Trust Fund in the form of matching fund grants. In the case of highways within the "Interstate System" (the National System of Interstate and Defense Highways, 23 U.S.C. 103(d)) the federal contribution is 92 percent; in the case of other federal-aid highways (23 U.S.C. 103 (b) and (c)), it is 63 percent.[13] During the five-year period 1959–1963, the State of Idaho expended an average of $42,000,000 per year for the construction and maintenance of its highways; during the same period it received an annual average of $23,000,000—roughly 55 percent of its total highway budget—from the federal government through the Federal Highway Trust Fund.[14] Moreover, the average annual contribution of Idaho highway users to the Fund, as estimated by the Department of Commerce, was about $14,000,000, some $9,000,000 less than Idaho received.[15] Thus, more than half the funds used to finance the building and maintenance of Idaho's highways came from the

[13] See United States Department of Commerce, Bureau of Public Roads, Circular Memorandum to Regional and Division Engineers, November 6, 1963.

[14] These figures are derived from Tables SF-1, SF-4, and SF-6 of *Highway Statistics*, an official annual publication of the Department of Commerce, Bureau of Public Roads, for the years in question. Since appellant did not contend in the courts below that the incidence of the tax was upon the federal government, we had no occasion to place these statistics in the record.

[15] These estimates are derived from Tables E-7 and E-8 of *Highway Statistics* (*supra*, fn. 14). The Federal Highway Trust Fund is financed by revenues generated by federal excise taxes on motor fuel; motor vehicles use; trucks, buses, and trailers; tires and tubes; and tread rubber.

federal Fund and approximately 21 percent ($9,000,000 per year) was provided by highway users in other States. We note, moreover, that these figures do not take into account sums expended for highways in Idaho by other federal agencies, including the AEC itself. For example, the very highway upon which most of the gas here sought to be taxed was consumed—U.S. 20 between Idaho Falls and the National Reactor Testing Station—was constructed at a cost of approximately $2,000,000, of which about $1,100,000 (55 percent) was supplied by the AEC, about $560,000 (28 percent) by the Federal Highway Trust Fund, and only about $340,872 (17 percent) by the State of Idaho (which, however, maintains the road).

This massive federal contribution reflects the recognition of Congress that an adequate system of highways within and between the States is essential to the national interests and, particularly, the national defense. 23 U.S.C. 101(b). Fairness to Idaho and its highway users plainly does not demand that the taxpayers of the United States, who have already paid, and are increasingly paying, a major part of the bill for Idaho's roads, should have to pay again when the Atomic Energy Commission uses those roads for the very purposes which elicited the federal matching-fund grants. We do not say that this consideration is a self-sufficient basis for exempting the government from an otherwise valid State tax. But it lays to rest any contention that compelling equities require a relaxation of the long-established, and here plainly applicable, rule of governmental immunity.

CONCLUSION

For the reasons stated, the judgment of the court below sustaining the tax should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

FRANK GOODMAN,
Assistant to the Solicitor General.

I. HENRY KUTZ,
ROBERT A. BERNSTEIN,
Attorneys.

CALVIN DWORSHAK,
Attorney for the American Oil Company.

OCTOBER 1964.

APPENDIX

The pertinent portions of the Idaho Motor Fuels Tax Act, as amended, 9 Idaho Code 49–1201, *et seq.* (1963 Cum. Pocket Supp.) are as follows:

49–1201. *Definitions.*—The following words, terms and phrases in this chapter, are, for the purpose thereof, defined as follows:

* * * * *

(c) The word "person" includes any individual, firm, co-partnership, association, corporation (both private and municipal), or other group or combination acting as a unit, and the plural as well as the singular number, unless the intent to give a more limited meaning is disclosed by the context.

(d) The term "dealer" shall include any person, as hereinabove defined, who first receives motor fuels in this state within the meaning of the word "received" as hereinafter in this section defined.

* * * * *

(g) * * * Motor fuel, for the purpose of determining liability for the payment of the tax imposed by section 49–1210, shall be considered to be "received" in the following cases:

1. Motor fuel refined at a refinery in this state and placed in tanks thereat or motor fuel transferred from points outside this state or from a refinery or pipe line terminal in this state and placed in tanks thereat shall be considered to be received when such fuel is withdrawn from such refinery or terminal storage for sale or use in this state or for transportation to destinations in this state other than for transfer to other refineries or pipe line termi-

nals in this state, and not before. When withdrawn from such refinery or terminal storage such motor fuel shall be considered to be received by the person * * * for whose account such motor fuels were withdrawn *if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owns such fuel immediately prior to its withdrawal from said storage.*

2. Motor fuel imported into this state other than that placed in storage at refineries or pipe line terminals in this state shall be considered to be received immediately after the same is unloaded and by the person who is the owner thereof at such time* *if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owned such fuel immediately prior to its being unloaded; provided, however, motor fuels shipped or brought into this state by a qualified dealer, which fuel is sold and delivered in this state directly to a person who is not the holder of an uncanceled dealer permit, shall be considered to have been received by the dealer shipping or bringing the same into this state; further provided that motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho.* * * *

* * * * *

49-1202. [1957 ed.] *Application for permit—Contents—Issuance of permit to dealers—Fee.*—It shall be unlawful for any dealer to import, receive, use, sell or distribute any motor fuels or

to engage in business, as a dealer in motor fuel, within this state unless such dealer is the holder of an uncancelled permit issued by the commissioner to engage in such business. * * *

*   *   *   *   *

49–1210. *Report of motor fuel received—Excise tax.*—(a) In addition to the taxes now provided by law, each and every dealer, as defined in this chapter, shall, not later than the twenty-fifth day of each calendar month render a statement to the commissioner of all motor fuels received, as the term "received" is defined in section 49–1201, during the preceding calendar month, and pay an excise tax of six cents per gallon on all motor fuels as provided * *in subsection (b) of this section.* * * *

(b) At the time of filing each monthly report each dealer shall pay to the commissioner an excise tax of six cents per gallon on all motor fuels "received," within the meaning of the term "received" as defined in section 49–1201, by such dealer during the next preceding calendar month ** *less* the * *deductions* and credits authorized in this chapter. * * *

*   *   *   *   *

49–1218. *Refunding of tax.*—Any person who shall buy fifty gallons or more and use any motor fuel for the purpose of operating or propelling stationary gasoline engines, tractors or motor boats engaged in commercial uses other than fishing, or for cleaning or dyeing or other use of the same, except as otherwise provided by law, and except in any motor vehicle required to be registered by the provisions of the uniform motor vehicle registration act, or exempt from registration by reason of ownership or residence and except an aircraft, and who shall have paid any excise tax on such motor fuel hereby required to be paid, whether directly to the vendor from whom it was pur-

chased, or indirectly by adding the amount of such excise tax to the price of such motor fuel, shall be entitled to be reimbursed and repaid the amount of such excise tax so paid by him * * *

*   *   *   *   *

U S GOVERNMENT PRINTING OFFICE: 1964